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No. 02-273

In The
Supreme Court of the United States

SPRINT CORPORATION, d/b/a SPRINT SPECTRUM L.P.,
SPRINT SPECTRUM FINANCE CORPORATION,
d/b/a SPRINT PCS,

Petitioners,

v.

WILLIAM E. GAGNON, JR.,

Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION TO SPRINT'S PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO SPRINT'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This fact-specific, yet-to-be-tried case arises out of two sets of employment discrimination laws, and evolved from the same contemporaneous set of facts causing discrimination against William E. Gagnon, Jr. ("Gagnon"): (1) reverse discrimination, as a white male; and (2) as a United States, military veteran, having a distinguished career as an officer in the United States Army for twenty-one years. The last decade of Gagnon's military career was spent developing, managing and administering highly sophisticated Computer Based Training ("CBT") and computer simulation training with top security clearance.

Gagnon was discriminated against under Title 42 U.S.C. Section 2000e, ("Title VII"), based on the uncontroverted, contemporaneous admission of Sprint Vice President, Mendenhall, that he would not approve the salary recommendations for Gagnon made by Sprint's human resources department and by management, ". . . because he is just a white guy. . . . if he were a woman or a minority, I would have to pay him, but I don't have to pay him . . . . he's just a white guy." As a direct result, Gagnon, who had received the highest salary ranking for the management team, suffered damages by receiving $10,000 less than any other manager in the Kansas City training department,("TAPS"), as its first CBT-Manager. [1]

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[1] Sprint's factual account in its petition's Statement of the Case, is improperly skewed. Gagnon initially took the non-management Curriculum Developer position in March 1997, at a lower salary, with the understanding that a management position would soon be opening for him – which it did when he became CBT-Manager in October 1997. The evidence contained in Sprint's own documents show the calculation for Gagnon's salary at 100% of the recommended market reference point (MRP) was a 33% or 35% increase, not a 50% increase. Most importantly, Sprint erroneously continues to argue application of a salary guideline (Sprint Petition, p. 4-5) that was **never** used, mentioned or raised by Sprint, until it submitted its response to **Gagnon's** Motion for Summary Judgement in late 2000. Moylan, Director of

Mendenhall ***directed*** Meredith-Ball to revise the salary recommendation to 10%. Meredith-Ball asked him to review the "business case justification" documents, but Mendenhall refused, tossing the paperwork at Meredith-Ball, stating, "I don't care about that stuff. If he wants to walk, let him walk. I'm not going to pay him. He's just a white guy. (Tr. 253-54). (The 11% figure was the result of 10% plus an automatic, pro rata 1% merit increase.)

This overt discrimination was reported to management, including human resources, but no investigation or remedial action occurred. While Sprint had a reporting/investigation policy for sexual harassment, it did not have a reporting policy for other forms of harassment or discrimination.

Contemporaneously, and ongoing, other, uncontroverted facts of discrimination were unfolding against military veterans, including Gagnon, in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994, Title 38 U.S.C. Section 4301 *et seq*., ("USERRA"). The uncontroverted evidence of veterans' discrimination culminated when Sprint formally responded to the Equal Employment Opportunity Commission on Gagnon's, Title VII, EEOC Charge of Discrimination, stating:

> Gagnon's performance was acceptable in that he met or exceeded his supervisor's expectations and the objectives established for his position. While Gagnon is a valued employee, he did not have all of the necessary technical expertise for the management position to which he was promoted until the Company paid for his

---

Compensation, and other Sprint management admitted that the appropriate salary policies were the establishment of Gagnon's MRP, through the Compensation Department, and a salary level within a range of 15% above or below the MRP. To avoid summary judgement in favor of Gagnon, Sprint submitted several affidavits to the trial court, where witnesses attempted to substantively change their deposition testimony, and to create this "after-the-fact" salary policy position invented by Sprint. Gagnon sought to quash the affidavits; however, the trial court not only denied Gagnon's motion, but relied upon the revised affidavit testimony in its decision to deny Gagnon summary judgement. Throughout Gagnon's employment at Sprint, he had the highest MRP and salary grade – but the lowest manager's pay in the department.

> training. Nor did Gagnon have the same level of relevant or industry-related experience. As demonstrated by Gagnon's resume, the majority of his experience before Sprint PCS was in the military; his counterparts had extensive training experience within corporations.

However, in fact, Sprint management admitted there was no inquiry regarding the depth and scope of Gagnon's prior CBT experience and the reporting Director, Wilder, did not even know the scope of Gagnon's experience – which in fact was extensive under any setting. Thus, not only did Sprint's defense lack any credibility, but Sprint attempted to defend against reverse discrimination by directly asserting another unlawful, discriminatory reason -- that Gagnon was paid less, because his, "experience before Sprint PCS was in the military."

Gagnon's claims of USERRA discrimination were never investigated nor remedied. In fact, Gagnon was subsequently punished by Sprint, in writing, specifically for his complaints of discrimination. Gagnon was effectively black-balled from any future transfers or promotions within the Sprint organization. Further, in July and August 1998, Sprint refused to process a salary increase previously promised to Gagnon by his Director, Wilder, in further retaliation.

The District Court granted Sprint's partial motion for summary judgement, dismissing the USERRA claims, effectively holding that negatively assessing a person's military background is not discriminatory. At trial, the District Court granted Sprint's motion for judgement as a matter of law (JAML) dismissing the Title VII claims.

On Gagnon's appeal to the Eighth Circuit Court, the District Court was reversed on the Title VII holding, where Gagnon had met his higher burden in establishing "reverse discrimination," and the uncontroverted evidence established liability against Sprint for race and gender discrimination.

Sprint's Petition for Writ of Certiorari (No. 02-273) challenges that holding of the Eighth Circuit.

Gagnon also appealed the summary judgement granted to Sprint on the USERRA claim. While the Eighth Circuit held that the District Court's interpretation of the USERRA was in error, it *sua sponte* created a statutory interpretation that even though Gagnon was discriminated against as a military veteran, he did not have a monetary remedy.

Gagnon has filed his Petition for Writ of Certiorari on the important public policy, and issue of first impression before this Court, regarding the statutory remedial scheme clearly stated in the USERRA. Gagnon's petition for writ is filed with this Court as Case No. 02-295.

REASONS FOR DENYING THE WRIT

I. SPRINT CANNOT SHOW A COMPELLING REASON FOR DISCRETIONARY REVIEW

This Court should deny Sprint's petition for writ of certiorari. Sprint has not presented an issue that meets the standards of this Court for granting a writ under Rule 10. Sprint has simply re-asserted its same arguments properly rejected by the Eighth Circuit in an attempt to avoid a jury trial in this simple case that impacts only one plaintiff and one defendant. This is not a "compelling reason" especially for a case that has not yet been tried to verdict.

In a last minute attempt to create ripe "conflict," Sprint seizes on the August 2, 2002 decision, Costa v. Desert Palace, Inc., 2002 WL 1772643 (9th Cir. 2002), to artificially create non-existent crisis. Gagnon v. Sprint does not pose any conflict among the lower courts. First, Gagnon follows the overwhelming weight of Circuit Courts which correctly and uniformly follow this Court's Price Waterhouse law. (Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

Second, the Costa decision does **not** raise the same issues as Gagnon, and these two cases cannot be adequately juxtaposed to assert such a conflict.

On the Title VII issue, Gagnon presents a simple reverse discrimination case. Under the higher evidentiary standards used by the Eighth Circuit for reverse discrimination, Gagnon has already been subject to, and met, a higher burden of proof. The Costa case did not involve reverse discrimination. Nor does it involve direct evidence. Costa simply has no effect on, or relation to, Gagnon.

Sprint then contends, (as it has at each phase of this case), that a person of the same racial or gender make up as the plaintiff cannot cause discrimination. The Eighth Circuit Court applied the well settled law through the decisions of this Court, which dispel Sprint's theory. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998). Nonetheless, Sprint asserts that the Eighth Circuit decision conflicts with decisions of this Court. It does not.

II. WRIT OF CERTIORARI IS NOT APPROPRIATE WHERE THE ISSUE HAS NOT BEEN FULLY TRIED.

Sprint filed a motion for partial summary judgment with the District Court in late 2000. The only argument by Sprint was to summarily dismiss Gagnon's claims under the USERRA. Sprint did not challenge the basis of Gagnon's Title VII claims as a matter of law – which was understandable given the uncontroverted evidence of discrimination and retaliation against Gagnon because of his veteran's background.

On January 4, 2001, the District Court granted Sprint's partial motion and dismissed the USERRA claims. The Title VII, reverse discrimination and retaliation claims proceeded to jury trial from January 22, 2001 through January 25, 2001. At the end of Gagnon's case, Sprint moved for judgment as a matter of law, and submitted a brief to the trial court on the spot.

Upon hearing brief oral arguments, within minutes of the motion, the trial judge announced his ruling to dismiss the case, stating:

> This case shows the extreme to which Title VII has come, as people who otherwise shouldn't be asking that they be protected, now decide that they want to get in on that reverse discrimination case. (Tr. 1045).

The trial court then asked Sprint to submit a fully briefed Order of JAML with the opportunity for objection from Gagnon. The Order was eventually entered on May 10, 2001. (App. 4, to Gagnon's Petition, Case No. 02-295). In sum, the trial court held that Vice President, Mendenhall, was not the ultimate decision-maker on Gagnon's salary, because another approval signature was needed after Mendenhall's. The person providing the "fourth" signature, however, was never provided any information regarding the initial paperwork and salary recommendations and only saw the revised proposal after the discrimination had occurred.

The Eighth Circuit rejected the findings of fact and legal conclusions by the trial court, reversing and remanding the case.

The new trial has not occurred and there is no final verdict in the underlying Title VII claim for this Court to review.

Gagnon suggests it would be historically and procedurally unusual for this Court to grant a writ of certiorari on a specific issue that has not reached final judgment at the trial court level. Further, Gagnon contrasts this point to his own petition for writ of certiorari, where his claims under the USERRA have reached final judgment in the trial court and Circuit Court of Appeals, and he would otherwise be denied trial on those issues absent a hearing before this Court.

III. THE COSTA CASE DOES NOT RAISE THE SAME ISSUES AND DOES NOT CREATE A CONFLICT INVOLVING THE EIGHTH CIRCUIT COURT OF APPEALS.

First, both Costa and Gagnon, as plaintiffs, prevailed in the appellate decisions and thus no conflict results.

Second, in Costa, the Ninth Circuit heard the case, en banc, to review the specific legal argument raised by defendant, Caesars, to wit:

> Caesars argues that Costa should have been held to a special, higher standard of "direct evidence," a threshold it claims she did not meet.

Costa, 2002 WL 1772643, p. 7. This has never been an issue in the Gagnon case.

The thrust of Caesars' argument was that so long as it could posture the case under a mixed-motive analysis, and raise a "same decision" affirmative defense, a plaintiff must always be held to a higher, direct evidence standard, as opposed to Costa's case based on a pretext/circumstantial evidence framework. The Ninth Circuit held that Costa was not required to present a direct evidence case for the jury to hear, even if Caesars' could present a same decision, affirmative defense.

Sprint never has, nor could it, advance such an argument in the Gagnon case. In fact, Gagnon was held to a higher standard of "direct evidence" to move forward with his case. Mendenhall's rejection of both the management and human resources' department recommendations for a higher salary was clearly articulated in his own words, at the time of the decision, ". . . because he's just a white guy."

Sprint's argument always has been that so long as the corporate structure can create another signature of approval, purportedly blind to prior discriminatory action, it can avoid

liability. This argument was properly rejected by the Eighth Circuit and is consistent with every other Circuit Court.

IV. GAGNON WAS ALREADY HELD TO A HIGHER STANDARD OF EVIDENCE, UNDER EIGHTH CIRCUIT PRECEDENT, IN PRESENTING A "REVERSE" DISCRIMINATION CASE.

Under Eighth Circuit precedent, it was held that in a reverse discrimination case, Gagnon was held to a higher burden of proof:

> Because this is a claim of reverse race discrimination, Gagnon additionally must show "that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997) (quoting Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985)). However, if Gagnon fails to make this showing, he may still proceed by adducing sufficient evidence of intentional discrimination against ***him***, in order to proceed beyond the prima facie case stage of litigation. Id. In other words, he is clearly able to proceed in a reverse discrimination claim if there is direct evidence of discrimination.

Gagnon v. Sprint, 284 F.3d 839, 848-49.

Again, the different, initial framework applied to Gagnon's reverse discrimination claim separates it far and apart from the fundamental issues arising in the Costa decision. No conflict exists between the courts – unless Sprint is desirous of arguing that the Costa case actually reduces the evidentiary burden already applied to Gagnon. Sprint has obviously attempted to carefully swerve around this critical point in presenting its petition to this Court. Given this higher burden applied to Gagnon, Sprint is aware that it effectively eliminates its "same decision" defense, unless this Court allows Sprint to use unlawful, veterans' discrimination to create a mixed-motive.

V. IT REMAINS A SETTLED MATTER OF LAW THAT A PERSON WITH THE SAME RACIAL OR GENDER CHARACTERISTICS AS THE PLAINTIFF CAN CAUSE DISCRIMINATION.

Sprint attempts to "bootstrap" into "conflict" an already settled matter of law. At page 21 of Sprint's petition, it contends; "II. Review is Necessary Because the Gagnon Decision Conflicts with the Decision of This Court." The thrust of Sprint's argument is spelled out at pages 21- 22 of the petition, urging that an "animus" of racial and gender discrimination must be shown in Mendenhall's "state of mind." This was the same argument advanced to the trial court – that Mendenhall, as a white male, could not discriminate against a white male. The trial court erroneously accepted this contention in its JAML Order. However, the Eighth Circuit properly rejected this argument both in its written decision and when Sprint raised it in oral arguments. As aptly stated by Judge Morris Shepard Arnold, during oral arguments in Gagnon (34:20):

> Title VII does not require a showing of bigotry, it just simply requires a showing of cause linked to race. So it may be, for instance, that what the gentleman meant was that . . . I would have to give this raise to a black and a woman, but I'm not going to give it to the man because I don't have to, and that has nothing to do with animus in a bigotted sense against males, but it does show a causal relationship between race and the lack of benefits. That's all Title VII requires – motive.

The rejection of Sprint's ongoing animus/bigot argument is absolutely consistent with this Court's rulings:

> [B]ecause of the many facets of human motivation, it would be unwise to presume a matter of law that human beings of one definable group will not discriminate against other members of their group.

Casteneda v. Partida, 430 U.S. 482, 499 (1977); see also Johnson v. Transportation Agency, Santa Clara Cty., 480 U.S. 616, 624-25 (1987); and Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998).

Sprint's, same argument was also effectively rejected in the Costa case – again, emphasizing a lack of any conflict between the Circuit Courts:

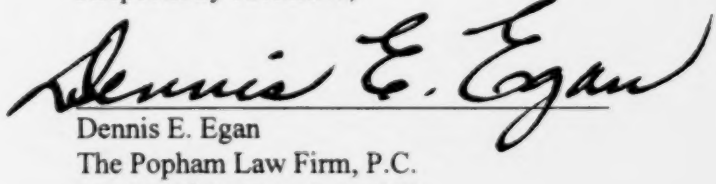
> Finally, we detour briefly to address the suggestion that Hallett was somehow incapable of discriminating against Costa because Hallett was herself a woman. This argument was resoundingly rejected by a unanimous Supreme Court in Oncale, 523 U.S. at 80-81, 118 S.Ct. 998.

Costa, 2002 WL 1772643, at p. 20.

CONCLUSION

The decision in Gagnon does not conflict with decisions of this Court nor with other Circuit Courts. This fact-driven case involves one plaintiff's unremarkable claim of reverse discrimination that has yet to be tried, and is thus far from ripe. For all of the foregoing reasons, Gagnon, as Respondent in Case No. 02-273, requests this Court to deny Sprint's Petition for a Writ of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Sprint's Petition for Writ of Certiorari were mailed by first-class United State mail, postage prepaid, this 16th day of September, 2002, to:

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